

LELAND Q. PHELPS

IBLA 92-508

Decided November 3, 1995

Appeal from a decision of the California State Director, Bureau of Land Management, dismissing a protest to a metes and bounds survey.
CA 942, Group 888, 9661.

Affirmed as modified.

1. Surveys of Public Lands: Independent Surveys

Tracts surveyed by metes and bounds represent the position and form of lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true original positions.

APPEARANCES: Norman F. Webb, Esq., Salem, Oregon, for appellant;
Clifford A. Robinson, Chief, Branch of Cadastral Survey, Bureau of Land Management, Sacramento, California, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Leland Q. Phelps has appealed from a decision of the California State Director, Bureau of Land Management (BLM), dated May 6, 1992, dismissing a protest of a metes and bounds survey of lands owned by appellant. The lands at issue, fractional sec. 16, T. 48 N., R. 12 W., Mount Diablo Meridian, are located in the Rogue River National Forest, Siskiyou County, California, immediately south of the California-Oregon border. Sec. 16, also known as tract 37 in the record, is surrounded on all sides by public land.

The parties do not dispute that the California-Oregon border forms the northern boundary of tract 37. The parties do not dispute the acreage of tract 37 (approximately 120 acres) or its general configuration. At issue, however, is the location of the northeast corner of this tract. Appellant argues that the northeast corner should be 400 feet west of where BLM locates it. The effect of such a change would be to shift tract 37 400 feet west of BLM's site and place the western portion of the tract in an area of considerable timber value.

The township containing tract 37, T. 48 N., R. 12 W., Mount Diablo Meridian, was fraudulently surveyed in 1884 by Charles Holcomb, a deputy of John A. Benson. An investigation of corner conditions in sec. 16 during 1984-86 yielded "extremely poor" original corner point recovery. No evidence of original surveys within the interior of this township was found, and existing topography failed to match the original record. A report by Harold Center, supervisory land surveyor, Rogue River National Forest, U.S. Forest Service, dated August 1, 1986, recommended that sec. 16 be established as a tract and surveyed by metes and bounds.

Center's August 1, 1986, report stated that the north boundary of sec. 16 was to be governed by the Oregon/California boundary. The east/south boundary was to be governed by timber harvest lines depicted on aerial photograph USDA F12 616100A 183-237. The west boundary was to be adjusted east or west to provide the tract with the acreage in the original patent (approximately 120 acres). Center's recommendation that sec. 16 be established as a tract and surveyed by metes and bounds was adopted in special instructions issued by BLM in November 1986.

The rationale for Center's recommendation was explained in a letter of July 29, 1987, that Center wrote to "Douglas Watson et al." ^{1/} Watson et al. are described by Center as the owner(s) of tax lot No. 08-01-01 within sec. 16. Center stated that he had been unable to locate sufficient original corners to perform a dependent survey and had, therefore, sought to identify Watson's private land by tracts. This method of independent survey is used where a limited number of original corner points are recovered and private lands are present, Center explained. An independent survey is designed to supersede the original survey, segregate private lands as tracts, and redescribe them by metes and bounds. Id. Having marked on the ground the corners of the lands at issue with iron post monuments, Center invited Watson et al. to review the location of the tract on the ground.

In a second invitation, dated December 26, 1989, Center recited that he had completed the field survey portion of the project and had begun to prepare final field notes and plats. By letter of December 21, 1990, Phelps stated that he disagreed with the boundaries of sec. 16 set by Center and believed that sec. 16 was south of this location.

Center responded to Phelps' statement by sending appellant a draft copy of the field notes and a 1975 aerial photograph (F12 A0150 0675 35). This photograph showed the intersection of two timber harvest lines, Center stated, a northerly line running along the California-Oregon boundary and an easterly line marked with blazed trees. This intersection was used to locate the northeast corner of tract 37, Center explained. The west line

^{1/} By deed dated May 1, 1981, sec. 16 was conveyed to Douglas Watson, Rod Malone, and appellant Leland Phelps by Lorin and L. Carlene Severson.

of tract 37 was established parallel to the east line, and the south line was adjusted to meet the original patent acreage (Correspondence, Jan. 4, 1991).

By letter of May 18, 1991, Phelps protested Center's survey, contending that the location of an old existing road indicated that Center had placed the east line of sec. 16 several hundred yards east of its proper location. Phelps repeated this argument by letter of June 14, 1991, and cited in support conversations with Lorin Severson, a prior owner of sec. 16. Appellant also questioned the validity of the easterly blaze line cited by Center, claiming that Severson had stated that a harvest by Ray Offord along this line occurred on Forest Service land east of sec. 16. Phelps further based his protest on Severson's statement that the west line of sec. 16 was nearly perpendicular to a sharp turn in the road on the south side of the section.

In a letter dated January 30, 1992, Phelps relied upon actions by the Forest Service in 1965 to support his argument that BLM had mislocated sec. 16. Phelps referred specifically to a refund by the Forest Service of a portion of the sales proceeds from the Whiskey Creek timber sale. The Forest Service made this refund because it had received funds for timber cut in trespass by Mountain Fir Lumber Company on sec. 16. In 1965, sec. 16 was owned by Dr. W. C. Bishop and Robert L. Wells. In determining the size of the trespass, appellant stated, "a survey was made to establish Section 16" (Jan. 30, 1992, letter at 1). This 1965 "survey" is key to appellant's case.

In the January 30, 1992, letter appellant also contended that the Forest Service was estopped to question the boundary line established in 1965 and relied upon by all prior owners of sec. 16. Phelps stated that he, Douglas Watson, and Rodney Malone, prior owners of sec. 16, viewed the location of sec. 16 as established by the Forest Service, relied upon material representations by the Forest Service, and changed their position in reliance by purchasing sec. 16. Appellant states that as of February 10, 1989, he is the sole owner of sec. 16.

Appellant also invokes principles of "boundary by acquiescence" and "practical location" in arguing that the Forest Service cannot now question the line which it has recognized for years to be correct. Recognition of a property line by acquiescence is conclusive as to the existence of an agreement, Phelps states.

The California State Director, BLM, dismissed Phelps' protest by a comprehensive decision, dated May 6, 1992, emphasizing that the sole authority to conduct surveys is vested in the Secretary of the Interior and, by delegation, in BLM. No authority exists in the Forest Service to conduct the type of official survey necessary to properly identify the boundaries of former sec. 16, the State Director stated.

The State Director also discussed appellant's exhibit G, a 1965 memorandum signed by Joseph D. Genre of the Forest Service, that appellant relied upon to establish the 1965 Forest Service "survey." This memorandum indicated that Genre made a "stump cruise" of "what appears to be" timber cut in trespass adjacent to the Whiskey Creek sale and found that 289.76 MBF (thousand board feet) had been erroneously cut. The above-quoted language does not support a claim that a de facto survey has been done, the State Director held, and Genre's actions do not constitute such misrepresentation as would provide a basis for estoppel (Decision, May 6, 1992, at 7). The State Director further emphasized the limited nature of the 1965 stump cruise by quoting from a June 25, 1965, memorandum from the Assistant Regional Forester, stating that "an eventual G.L.O. [General Land Office] resurvey may completely change the extent of the suspected trespass."

Having rejected the Genre stump cruise as an official survey, the State Director nevertheless found it to have importance. The line run by Genre in 1965 coincides with the cutting line established by Ray Offord, who logged the northeast portion of sec. 16 in the early 1970's (Decision at 17). Offord's cutting line is "the east boundary of the section," the State Director held.

The State Director also addressed at some length the arguments of Douglas Watson and Rodney Malone. In May 1981, Watson, Malone, and Phelps purchased sec. 16 from Lorin Severson. Watson and Malone agree with Phelps that the location of sec. 16 is some 400 feet west of Center's site. Their arguments rely on aerial photograph F12 A0150 0675 37 (exhibit B to the Jan. 30, 1992, letter), dated August 5, 1975, Forest Service maps (exhibits C and D), ^{2/} and sale area maps for the Whiskey Relog sale (exhibits P and Q). Section lines shown on exhibit C provide only an approximation of the area covered by the map, and not one of the maps relied upon by appellant asserts to be a reliable representation of land lines, the State Director held (Decision at 18).

Addressing appellant's estoppel arguments, the State Director noted that each of the cases cited by appellant was decided by state courts and none involved a claim against the Federal Government. It is a settled rule of law that the principle of equitable estoppel does not apply against the United States, the State Director held (Decision at 20).

In his statement of reasons (SOR), Phelps disputes the State Director's holding that estoppel does not lie against the United States. Appellant cites United States v. Ruby Co., 588 F.2d 697 (9th Cir. 1978), cert. denied, 442 U.S. 917 (1979), a case involving a fraudulent survey by the Department of the Interior. In that decision, at pages 701-02,

^{2/} The State Director noted that the Forest Service map represented by exhibit C is actually a composite of four enlarged topographic maps prepared by Geological Survey (Decision at 18).

the court held: "We are not unmindful of the well-worn statement that the government is not subject to the equitable defense of estoppel * * *. Our reading of the more recent decisions, however, leads us to the conclusion that this rule is no longer absolute." (Citations omitted; SOR at 6-7.)

Phelps states that the pending survey by Center destroys bona fide vested rights and that the prior owners of sec. 16 relied upon the location of sec. 16 as found by Genre (SOR at 5, 13). Appellant attacks in particular the State Director's characterization of Genre's work as a "stump cruise." Any reasonable person would conclude that a survey had occurred. Id. at 10-11. Clear historical recognition exists of the location of the northeast corner of sec. 16, 400 feet west of where Center locates it, appellant maintains. Id. at 17. Finally, Phelps requests a hearing to present evidence from prior owners of sec. 16 to the effect that each relied upon Forest Service representations in purchasing this parcel. Id. at 18.

[1] The Manual of Surveying Instructions (1973) provides at section 6-5 that tracts surveyed by metes and bounds represent the position and form of the lands alienated on the basis of the original survey, located on the ground according to the best available evidence of their true original positions. See also J. M. Beard (On Rehearing), 52 L.D. 451, 454 (1928). We therefore will seek to identify the best available evidence of the location of sec. 16 on the ground.

The location of the northeast corner of sec. 16 is key to the location of sec. 16 on the ground. Both BLM and appellant agree that the line used by Genre in calculating the amount of timber cut in trespass in 1965 serves as the east boundary of the section. This line was determined by Genre in this way:

The NE corner of Section 16, T. 48 N., R. 12 W., Mt. Diablo Meridian, was located by using the nearest known corner on the California line and computing the distance it should be to the corner of Sec. 16. This point fell between line tree 2 & 3. By locating line tree 2 & 3 and chaining the appropriate distance along the state line, a point was established that was used as the NE corner of Section 16. From the fraudulent notes for Section 16, it was found that the east side of the section should be 17.76 chains long. This distance was chained due South and a point established as the SE corner of Section 16. From this point a line was run due West for 5 chains or the point where the line left the cutting area.

(Jan. 30, 1992, letter; Exh. G).

Genre took this action to calculate the amount and value of timber that had been cut in trespass from sec. 16, then owned by Bishop and Wells. Mountain Fir Lumber Company had caused the trespass by cutting 289.76 MBF

from the southeast portion of sec. 16 during its harvest of adjacent lands within the Whiskey Creek sale. The owners of sec. 16 were compensated in the amount of \$2,692.81. This transaction is important because it indicates, in the absence of any monuments or improvements, where the owners of sec. 16 and the adjacent landowner, the Forest Service, agreed the east boundary of sec. 16 was located.

Despite the importance of Genre's actions, they do not constitute a survey of sec. 16. Even if Genre's purpose were more than a stump cruise, survey lines extended by the Forest Service upon lands under its jurisdiction do not constitute official surveys of the United States. Benton C. Cavin, 83 IBLA 107, 130 (1984). Appellant's suggestions to the contrary are mistaken. First American Title Insurance Co. v. Bureau of Land Management, 110 IBLA 25, 33 (1989).

When Harold Center performed the metes and bounds survey of sec. 16, ^{3/} he located the northeast corner of sec. 16 as follows:

The northeast corner of Tract 37 was located by utilizing a point of beginning determined at the intersection of a timber harvest line running North-South with the intersection of the Oregon-California boundary. From this point, record bearing and distances served as controlling factors, with the north boundary determined along the line between corners No. 1, No. 2 and No. 3 of the Oregon-California state boundary, as determined by Rodolf and Bond in 1915. [Emphasis added.]

(Field Notes (revised) at 11).

The timber harvest line that Center refers to is the eastern boundary of a clear-cut by Ray Offord. Offord is the successor in interest to Bishop and Wells in sec. 16, and his clear-cut occurred during the period 1971-75. ^{4/} Genre's line formed the eastern boundary of Offord's cut, BLM states, but appellant places the Genre line (and the eastern boundary of sec. 16) some 400 feet west of BLM's eastern boundary.

The effect of appellant's argument is to place Offord's clear-cut on Forest Service lands in the adjacent sec. 15. Absent authorization for cutting here (and none is suggested in the record), Offord would have cut in trespass. No trespass prosecution occurred, however, even though the Forest Service was aware of Offord's cut, having granted permission to him to haul logs on Forest Service roads (Affidavit of Kenneth A. Perreard,

^{3/} Center, an employee of the Forest Service, U.S. Department of Agriculture, surveyed sec. 16 pursuant to special instructions issued by BLM on May 15, 1984, and thereafter supplemented on Nov. 3, 1986.

^{4/} Photograph F12 A0150 0675 35, dated Aug. 5, 1975, is the clearest depiction of Offord's cut. This map accompanied correspondence from Harold Center to appellant's counsel, dated Jan. 4, 1991.

May 15, 1991). Forest Service action might be expected because it had participated less than 10 years earlier in resolving the trespass by Mountain Fir Lumber Company in the immediate area. Appellant's suggestion that Offord cut in trespass 5/ is unpersuasive and fails to harmonize the facts of record.

Additional evidence that the Offord cutting line coincides with the Genre line and the eastern boundary of sec. 16 is set forth in Center's field notes. Fourteen links north of where Center places the northeast corner of sec. 16, Center found "a mound of stone and wood post believed to have been established by the Forest Service, in 1965 as part of a timber trespass survey." Genre makes no mention of such mound and post in his report, 6/ but Center's notes speak of a reference tree with blaze facing the corner position and a ring count of the growth rings date the blaze to 1965, the year of Genre's cruise.

Appellant states that when he, Douglas Watson, and Rodney Malone bought sec. 16 in 1981, they did so in reliance upon certain documents that Malone later used in preparing exhibit B. This exhibit is a color photograph (F12 A0150 0675 37) dated August 5, 1975, on which Malone states he has "framed" sec. 16, *i.e.*, drawn the boundaries of this section. In framing sec. 16, Malone states that he relied upon a Forest Service District map (exhibit C), which showed the southwest corner of sec. 16 to be "nearly due north of Knox Gulch." In 1980, Malone walked portions of sec. 16 and used the bridge at Knox Gulch to locate the southwest corner (Affidavit of Rodney Malone, January 30, 1992, at 2, 4).

Malone states that Severson showed him another aerial photograph which "conformed" to Malone's understanding of the location of sec. 16 (Malone Affidavit at 3). At this time, the northeast corner of sec. 16 was established several hundred feet west of the northwest corner of a clear-cut, Malone states, and this conformed to the Whiskey Relog map (exhibits P (at 11) and Q). The northeast corner of sec. 16 is approximately 400 feet west of where Center has established it. *Id.* Malone also expresses confidence in exhibit E, a map overlay dated December 17, 1965, showing the location on sec. 16 of the 1965 trespass and remaining timbered areas. Exhibit E conforms to Malone's determination of the location of sec. 16. *Id.* at 6. Malone states that he, Watson, and Phelps rightfully relied upon this location of sec. 16 when purchasing the property in 1981. *Id.* at 8.

Malone's statements and those of appellant go to appellant's argument that the Forest Service should be estopped to assert that the boundary line of sec. 16 is different from the line previously established

5/ In a letter to BLM dated June 14, 1991, counsel for Phelps states:

"Mr. Severson informs me that the logging that was done on the east side of Section 16 by Mr. Offord was on Forest Service property."

6/ This report is exhibit G to appellant's protest.

and relied upon by all prior owners of sec. 16 (January 30, 1992, Letter at 2). Appellant correctly states that the State Director erred in holding that principles of estoppel do not operate against the Government, as BLM acknowledged in its Feb. 8, 1993, Answer. United States v. Ruby Co., *supra* at 702. The State Director's decision must be modified in this respect. It is clear, however, that estoppel is an extraordinary remedy, especially as it relates to public lands. James W. Bowling, 129 IBLA 52, 55 (1994); Double J Land & Cattle Co., 126 IBLA 101, 107 (1993).

Relying on Sweeten v. U.S. Department of Agriculture Forest Service, 684 F.2d 679, 682 n.5 (10th Cir. 1982), appellant identifies the elements of estoppel in this way: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury. Sweeten makes clear that appellant must also show affirmative misconduct by the Government or its agents to establish estoppel against the Government in an action concerning the boundaries of land granted in a federal land patent. 684 F.2d at 682.

The misrepresentations by the Forest Service that are chiefly relied upon by appellant are identified as exhibits C, D, P, and Q. Exhibit C, as noted above, is a Forest Service District map based upon four topographic maps of the Geological Survey. This exhibit was apparently used by appellant to frame sec. 16, as shown on his exhibit B. Exhibit D is a road map showing Middle Fork road. Exhibits P and Q appear to have been used by appellant to support his placement of the northeast corner of sec. 16, as shown on exhibit B, some 400 feet west of Center's corner. Exhibits P and Q are sale area maps that show in diagram form the boundaries of the nearby Whiskey Re-log timber sale, a Forest Service sale that was never completed. These diagrams show the location of existing and proposed roads, sale area boundaries, and section lines. Sheet 3 of exhibit P states that "[l]andlines are approximate."

We do not find in exhibits C, D, P, Q, or others offered by appellant the "affirmative misconduct" required by Sweeten to support an estoppel against the Government. In Schweiker v. Hansen, 450 U.S. 785, *reh'g denied*, 451 U.S. 1032 (1981), the Supreme Court offered some insight into this term when it refused to disturb a finding that affirmative misconduct was absent in a situation involving a Social Security Administration employee who, in response to a direct question about eligibility, gave incorrect information to a potential applicant for benefits. Additional cases construing "affirmative misconduct" are set forth in United States v. Ruby Co., *supra* at 702-03. Our review of these cases persuades us that such "affirmative misconduct" as would permit appellant to successfully invoke the doctrine of estoppel is lacking in the instant case: there was

no misrepresentation or concealment of material facts ^{7/} In the absence of a showing of affirmative misconduct, it is unnecessary to examine whether the other elements of estoppel are present.

Had appellant shown all the elements of estoppel, it is nevertheless clear that the location of sec. 16 as shown on exhibit B of appellant's Jan. 30, 1992, letter is inconsistent with appellant's acknowledgement of the 1965 trespass there. A careful examination of exhibit B and aerial photograph EXS-10-93, dated August 12, 1971 (prior to Offord's cut), indicates that sec. 16, as framed by appellant on exhibit B, is almost completely separate from the area cut in trespass by Mountain Fir Lumber Company in 1965. Appellant's location for sec. 16 ignores the Genre line, whose purpose it was to assess the size of the trespass on sec. 16.

Our review of the record causes us to conclude that the best available evidence of the location of sec. 16 supports BLM's action here. Because there are no material facts in dispute, appellant's request for a hearing is denied. Woods Petroleum Co., 86 IBLA 46, 55 (1985).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the California State Director is affirmed as modified.

Will A. Irwin
Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge

^{7/} In a Jan. 25, 1982, letter to Ron Stover of Southwest Development Company, Forest Supervisor Robert J. Devlin advised Stover that the Forest Service map used by Stover "does not have a standard of accuracy that could be used to establish a property line. The section lines on the map are merely schematic." See enclosures to Feb. 18, 1992, memorandum from Harold Center to Jack Rabedew, California State Office, BLM. Southwest Development Company is listed as the owner of an undivided one-third interest in sec. 16 in title insurance documents appearing at appellant's exhibit U to his Jan. 30, 1992, letter. Appellant, Malone, and Watson are listed as owners of the remaining two-thirds interest.

